

1 THE HONORABLE JOHN C. COUGHENOUR
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MARIO RODRIGUEZ,

11 Plaintiff,

v.

12 THE BOEING COMPANY,

13 Defendant.

CASE NO. C18-1213-JCC

ORDER

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15 This matter comes before the Court on Defendant's motion for summary judgment (Dkt.
16 No. 31). Having thoroughly considered the parties' briefing and the relevant record, the Court
17 finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained
18 below.

19 **I. BACKGROUND**

20 Plaintiff resigned from his employment with Defendant in May 2018. (*See* Dkt. No. 32 at
21 40–41 (resignation letter).) At the time, Plaintiff was on voluntary leave with an outstanding
22 offer to move into a new position within Defendant. (*Id.*) Plaintiff asserts that, before
23 commencing his leave, Defendant took discriminatory adverse employment actions that made
24 Plaintiff's working conditions untenable, prompting him to resign. (*See generally* Dkt. No. 1-2.)
25 He filed his First Amended Complaint with the King County Superior Court (Dkt. No. 1-2),
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1 which Defendant removed to this Court. (See Dkt. No. 1.) Defendant now seeks summary
 2 judgment on the two claims asserted in the complaint: discrimination and unlawful discharge.

3 **II. DISCUSSION**

4 **A. Legal Standard**

5 “The court shall grant summary judgment if the movant shows that there is no genuine
 6 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
 7 Civ. P. 56(a). Material facts are those that may affect the outcome of the case, and a dispute
 8 about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a
 9 verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986).
 10 In deciding whether there is a genuine dispute of material fact, the Court must view the facts and
 11 justifiable inferences to be drawn from them in the light most favorable to the nonmoving party.
 12 *Id.* at 255. It is therefore prohibited from weighing the evidence or resolving disputed issues in
 13 the moving party’s favor. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

14 “The moving party bears the initial burden of establishing the absence of a genuine issue
 15 of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “If a moving party fails to
 16 carry its initial burden of production, the nonmoving party has no obligation to produce anything,
 17 even if the nonmoving party would have the ultimate burden of persuasion at trial.” *Nissan Fire*
 18 & *Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000). But once the moving
 19 party properly supports its motion, the nonmoving party “must come forward with ‘specific facts
 20 showing that there is a *genuine issue for trial*.’” *Matsushita Elec. Indus. Co. v. Zenith Radio*
 21 *Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Ultimately, summary judgment
 22 is appropriate against a party who “fails to make a showing sufficient to establish the existence
 23 of an element essential to that party’s case, and on which that party will bear the burden of proof
 24 at trial.” *Celotex*, 477 U.S. at 322. However, “very little evidence” is needed “to survive
 25 summary judgment in a discrimination case, because the ultimate question is one that can only be
 26 resolved through a searching inquiry—one that is most appropriately conducted by the

factfinder, upon a full record.” *Lowe v. City of Monrovia*, 775 F.2d 998, 1005 (9th Cir. 1985), *as amended*, 784 F.2d 1407 (9th Cir. 1986) (internal quotations omitted). But a plaintiff must offer more than “uncorroborated and self-serving” testimony to create ““a sufficient disagreement to require submission to a jury.”” *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996) (quoting *Anderson*, 477 U.S. at 251–52).

B. Discrimination

Plaintiff alleges discrimination based both on his sexual orientation and race. (*See* Dkt. No. 1-2 at 14–17.) Title VII and the Washington Law Against Discrimination (“WLAD”) make it unlawful for an employer to discriminate on the basis of an employee’s membership in any of several protected classes, including race, national origin, and sexual orientation. 42 U.S.C. § 2000e–2(a)(1); Wash. Rev. Code § 49.60.180; *see Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1741 (2020) (sexual orientation).

A plaintiff may establish a *prima facie* case of discrimination either through “a presumption arising from the factors such as those set forth in *McDonnell Douglas*, or by more direct evidence of discriminatory intent.” *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998), *as amended* (Aug. 11, 1998); *see Blackburn v. State*, 375 P.3d 1076, 1080 (Wash. 2016) (noting that “Washington courts often look to federal case law on Title VII when interpreting the WLAD”). “Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption.” *Godwin*, 150 F.3d at 1221 (quoting *Davis v. Chevron, U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir.1994)). If a plaintiff lacks direct evidence, courts look to the *McDonnell Douglas* burden-shifting framework to analyze both Title VII and WLAD discrimination claims. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973) (Title VII claim); *Hines v. Todd Pac. Shipyards Corp.*, 112 P.3d 522, 529 (Wash. Ct. App. 2005) (WLAD claim).

Within the *McDonnell Douglas* framework, to establish a *prima facie* case under Title VII, absent direct proof of discriminatory intent, a plaintiff must show that (1) he is a member of

1 a protected class, (2) he performed his job satisfactorily, (3) he suffered an adverse employment
 2 action, and (4) the defendant treated him differently from a similarly situated employee who does
 3 not belong to the same protected class. *See Cornwell v. Electra Cent. Credit Union*, 439 F.3d
 4 1018, 1028 (9th Cir. 2006). Under the WLAD, the plaintiff must show that: (1) he belongs to a
 5 protected class; (2) he was treated less favorably in the terms or conditions of his employment
 6 (3) than a similarly situated, non-protected employee, and (4) the plaintiff and the non-protected
 7 comparator were doing substantially the same work. *See Washington v. Boeing Co.*, 19 P.3d
 8 1041, 1048 (Wash. Ct. App. 2000).

9 If a plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to
 10 articulate a legitimate, nondiscriminatory reason for its action. *See McDonnell Douglas*, 411 U.S.
 11 at 802–04; *Hines*, 112 P.3d at 529. If the defendant does so, the plaintiff must then prove, by a
 12 preponderance of the evidence, that the reason asserted by the defendant is a mere pretext. *See*
 13 *McDonnell Douglas*, 411 U.S. at 802–04; *Hines*, 112 P.3d at 529.

14 Plaintiff does not assert that he suffered discrimination based on his *actual* sexual
 15 orientation but on his *perceived* sexual orientation. (*See* Dkt. No. 1-2 at 4, 6, 16; *see also* Dkt.
 16 No. 35 at 58–63 (Plaintiff’s testimony regarding comments made by a co-worker suggesting she
 17 thought he was homosexual).) Only one Washington court has squarely addressed the issue, and
 18 it found that this is not a protected class under the WLAD. *See Davis v. Fred’s Appliance, Inc.*,
 19 287 P.3d 51, 58 (Wash. App. 2012) (“We therefore conclude that ‘perceived sexual orientation’
 20 is not a protected class and therefore [the plaintiff] is not a member of a protected class.”).
 21 Plaintiff’s sexual orientation discrimination claims are barred as matter of law.

22 Turning to his allegations of racial discrimination, according to Plaintiff, it is “undisputed
 23 that he is a Latin American Male.” (Dkt. No. 37 at 17; *see also* Dkt. No. 35 at 59 (describing
 24 himself as Latino).) The only direct evidence Plaintiff presents of racial discrimination is his
 25 testimony that a coworker, Karon Wilmot, made harassing comments regarding “Latin American
 26 males leav[ing] their babies” and being “bad fathers.” (Dkt. No. 35 at 55; *see also* Dkt. no. 35 at

1 58 (Plaintiff's testimony that no other individual at work made comments regarding his race).)

2 Defendant asserts that Ms. Wilmot was merely a coworker—not a supervisor. (Dkt. No.
 3 31 at 24.) Thus, though these comments certainly betray racist sentiment, a non-supervising
 4 coworker's behavior generally cannot form the basis of a discrimination claim *See Jenkins v.*
 5 *Palmer*, 66 P.3d 1119, 1121 (Wash. Ct. App. 2003) (citing *Brown v. Scott Paper Worldwide Co.*,
 6 20 P.3d 921, 926 (Wash. 2001)). But Plaintiff testified that his direct supervisor was often absent
 7 from the office, leaving Ms. Wilmot, as the more senior employee, in a supervisory role. (*See*
 8 Dkt. No. 37-1 at 16.) He also testified that Ms. Wilmot took the lead on the project he worked
 9 on. (*Id.*) This evidence is sufficient to establish genuine dispute of material fact regarding Ms.
 10 Wilmot's role.

11 However, Plaintiff provides no direct evidence of a causal connection between Ms.
 12 Wilmot's alleged remarks and any adverse employment action he suffered. *See DeHorney v.*
 13 *Bank of Am. Nat. Tr. and Sav. Ass'n*, 879 F.2d 459, 468 (9th Cir. 1989) (requiring a nexus
 14 between offensive remarks and a decision maker's adverse employment actions). The Court will,
 15 therefore, apply the *McDonnell Douglas* burden shifting approach.

16 Plaintiff must make a *prima facie* showing, among other things, that (a) he suffered an
 17 adverse employment action and (b) was treated differently from a similarly situated employee
 18 who did not belong to the same protected class. *See Cornwell v. Electra Cent. Credit Union*, 439
 19 F.3d 1018, 1028 (9th Cir. 2006). He presents no evidence supporting either contention.

20 Regarding an adverse employment action—Plaintiff's complaint is replete with perceived
 21 injustices that Defendant allegedly inflicted. (*See generally* Dkt. No. 1-2.) But his briefing on
 22 Defendant's motion for summary judgment focuses on just three actions: Defendant's
 23 unwillingness to physically separate his workspace from Ms. Wilmot's, Defendant's 2017
 24 negative review of Plaintiff's performance, and Defendant's initial reluctance to approve
 25 Plaintiff's transfer to a new position within the company. (Dkt. No. 37 at 18–19.) None qualify
 26 as adverse employment actions.

1 According to Plaintiff, his “inability to be moved to a different seating arrangement” is
 2 “in and of itself” an “adverse employment action.” (Dkt. No. 37 at 19.) But Plaintiff provides no
 3 legal authority for this assertion. (*See generally id.*) Nor would the Court expect that he could.
 4 To establish cognizable harm under the WLAD, for example, an adverse employment action
 5 must have a significant impact on an employee. As Washington’s Court of Appeals has
 6 described:

7 ‘Not every employment decision amounts to an adverse employment action,’ even
 8 decisions that negatively impact an employee. An adverse employment action is
 9 generally limited to tangible employment actions that constitute a ‘significant
 10 change in employment status, such as hiring, firing, failing to promote,
 11 reassignment with significantly different responsibilities, or a decision causing a
 12 significant change in benefits.’ An adverse employment action ‘must involve a
 13 change in employment conditions that is more than an inconvenience or alteration
 14 of job responsibilities’ and must produce ‘a material employment disadvantage.’

15 *Simmons v. State*, 2015 WL 3488927, slip op. at 5 (Wash. Ct. App. 2015) (unpublished) (quoting
 16 *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998); *Strother v. S. Cal. Permanente Med.*
 17 *Grp.*, 79 F.3d 859, 869 (9th Cir.1996); *Kirby v. City of Tacoma*, 98 P.3d 827, 833 (Wash. Ct.
 18 App. 2004)). “‘Petty slights, minor annoyances, and simple lack of good manners,’ or personality
 19 conflicts or snubbing by supervisors and co-workers are not materially adverse actions.” *Byrne v.*
Wash. State Univ., 2007 WL 2572312, slip op. at 4 (E.D. Wash. 2007) (citing *Burlington N. &*
Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)). Defendant’s decision to not physically
 20 separate Plaintiff’s workspace from Ms. Wilmot’s is not an adverse employment action.

21 While a negative performance review could be an adverse employment action, it is
 22 undisputed that Plaintiff abandoned his job while the appeal of his performance review was
 23 pending. (*See* Dkt. Nos. 1-2 at 10-11, 37 at 8.) Therefore, it cannot constitute an adverse
 24 employment action. *Brooks v. City of San Mateo*, 229 F.3d 917, 929–30 (9th Cir. 2000) (negative
 25 performance review cannot constitute an adverse employment action if the “evaluation could
 26 well have been changed on appeal”). Moreover, Plaintiff never offered legal argument on this
 issue in his opposition brief, effectively conceding it. *See Colman v. City of Seattle*, 2006 WL

1 1842978, slip op. at 4 (W.D. Wash. 2006).¹

2 Finally, the Court strains to understand how Defendant's initial reluctance to approve
 3 Plaintiff's transfer to another position within the company could constitute an adverse
 4 employment action when Plaintiff ultimately received his desired transfer. Defendant presents
 5 uncontested evidence that the delay lasted at most *two weeks*, and throughout this time
 6 Plaintiff was on voluntary leave, so he suffered no adversity from this delay. (*See* Dkt. Nos. 1-4,
 7 33 at 28-30, 35 at 143-44, 147, 162-68, 176.)

8 Plaintiff fails to make a *prima facie* showing that he suffered an adverse employment
 9 action. Nor does he present any evidence that he was treated less favorably than a similarly
 10 situated, non-protected employee. (*See generally* Dkt. No. 37.) Accordingly, summary judgment
 11 is GRANTED to Defendant on Plaintiff's discrimination claim.

12 **C. Unlawful Discharge**

13 Plaintiff alleges that he was wrongfully discharged in violation of public policy. (*See* Dkt.
 14 No. 1-2 at 18-19.) It is undisputed, though, that Plaintiff resigned from the company. (*See*
 15 *generally* Dkt. Nos. 31, 37.) Therefore, to assert an unlawful discharge claim, he must first
 16 establish that he was forced to resign, *i.e.*, constructively discharged. *See Peiffer v. Pro-Cut*
 17 *Concrete Cutting & Breaking Inc.*, 431 P.3d 1018, 1031 (Wash. Ct. App. 2018). A constructive
 18 discharge occurs if "working conditions [were] so difficult or unpleasant that a reasonable person
 19 in the employee's shoes would have felt compelled to resign." *Boeing Co.*, 19 P.3d at 1049.

20 Plaintiff's only evidence of constructive discharge is his own testimony regarding Ms.
 21 Wilmot's objectionable comments and his inability to find a position within the company
 22 commensurate with what he viewed his skills and expertise warranted. (*See generally* Dkt. No.
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24 ¹ Moreover, even if Plaintiff had established a *prima facie* case of employment
 25 discrimination based upon the results of his performance review, Defendant presents unrefuted
 26 evidence that the action was not pretextual. (*See* Dkt. No. 35 at 90-96 (performance review),
 141-49 (Peter Flor testimony), 163-70 (Danielle Donovan Testimony), 176-77 (Katie Frisbie
 testimony).

1 37 at 20–24.) But Defendant puts forth unrebutted evidence that Ms. Wilmot’s comments were
2 isolated, ceased after Plaintiff complained and Defendant coached her about such comments;
3 moreover, they were not temporally proximate to Plaintiff’s decision to resign. (See Dkt. Nos. 33
4 at 6–12; 35 at 57–62.) As a matter of law, these conditions were not so intolerable that a jury
5 could find they could support a claim based on constructive discharge. *See, e.g., Brooks v. City of*
6 *San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000); *Montero v. AGCO Corp.*, 192 F.3d 856, 861 (9th
7 Cir. 1999).)

8 Accordingly, summary judgment is GRANTED to Defendant on Plaintiff’s unlawful
9 discharge claim.

10 **III. CONCLUSION**

11 For the foregoing reasons, Defendant’s motion for summary judgment (Dkt. No. 31) is
12 GRANTED. Plaintiff’s First Amended Complaint is DISMISSED with prejudice.

13 DATED this 18th day of October 2021.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE